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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

No. 541

NATIONAL SURETY CORPORATION, a Corporation,
Petitioner,

vs.

W. T. MUSGROVE and WILLIAM R. CADENHEAD, Individually and as Partners Doing Business as Musgrove Insurance Agency, Gladys Holmes Southwick (Formerly Gladys Leith Holmes), and CONTINENTAL CASUALTY COMPANY, a Corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

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Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on July 15, 1963.

OPINIONS BELOW.

The judgment of the District Court (R. 602-604), entering the verdict of the jury, and subsequently overruling defendants' motion for a new trial, and in the alternative

defendants' motion to amend the judgment, and in the further alternative defendants' motion for a judgment notwithstanding the verdict (R. 637-638) are unreported. The opinion of the Court of Appeals (R. 646) is reported at 310 F. 2d 256. For background and companion or derivative cases, see **W. T. Musgrove et al. v. National Surety Corporation**, 191 F. Supp. 1; **Continental Casualty Company v. Musgrove**, 305 F. 2d 9. See also **Continental Company v. Holmes**, 266 F. 2d 269, cert. den. 80 S. Ct. 140, 361 U. S. 877, 4 L. Ed. 2d 114. The opinions of the Court of Appeals in the instant case, as well as its predecessor, Continental Casualty Company v. Holmes, supra, are set out in the Appendix to this petition.

JURISDICTION.

The judgment of the Court of Appeals was entered on October 17, 1962 (R. 661) and petitioner filed its application for rehearing on, to-wit, November 15, 1962, the same being denied on July 15, 1963. The jurisdiction of this court is invoked under 28 U. S. C. Sec. 1254 (1).

QUESTIONS PRESENTED.

1. Can a Court of Appeals uphold a District Court's denial of a litigant's right to a non jury trial in a case of equitable cognizance?

2. Can a Court of Appeals repudiate its own findings in a case between the same parties, and in a subsequent proceeding render an opinion on identical evidence but directly contrary to its previous holdings?

3. Can a Court of Appeals emasculate the statutory enactments of a State codifying its common law relating to fraud and deceit and render the same inoperative in determining what constitutes a fraudulent act within the exclusionary provisions of an insurance contract?

STATUTES INVOLVED.

Insofar as the right of the petitioner to a non jury trial is concerned, Title 7, Sec. 164, and Title 28, Sec. 12 of the Code of Alabama of 1940 are involved. Rule 38 (a) and Rule 81 (c) of the Federal Rules of Civil Procedure relate to the necessity and timeliness of a demand for a trial by jury.

Title 7, Sec. 108 and Sec. 110 of the Code of Alabama of 1940 represent codification of the law of fraud and deceit in said State.

The aforementioned statutes and rules are contained in the Appendix hereto.

STATEMENT OF THE CASE.

This case was commenced in the Circuit Court of Lauderdale County, Alabama, its vehicle being the Alabama Declaratory Judgment Act, Title 7, Secs. 156-168 of the Alabama Code of 1940. It was thereafter removed at the instance of the petitioner to the United States District Court for the Northern District of Alabama on the grounds of diversity of citizenship and the requisite amount for jurisdiction being in controversy. It stemmed from the dispute adjudicated in **Continental Casualty Company v. Holmes**, 266 F. 2d 269, cert. den. 80 S. Ct. 140, 361 U. S. 877, 4 L. Ed. 114, copy of the opinion being appended hereto.

The purpose of the declaratory proceeding filed by respondents Musgrove and Cadenhead was to secure a determination that National Surety Corporation, by virtue of an INSURANCE AGENTS AND BROKERS ERRORS AND OMISSIONS POLICY naming them as assureds therein, was obligated to defend two suits filed against them by the respondents Gladys Holmes Southwick (formerly

Gladys Leith Holmes) and Continental Casualty Company predicated upon claims for damages arising out of alleged negligent and unauthorized acts of Musgrove and Cadenhead as insurance agents and to pay any judgments resulting against them. A reading, in the order of their chronological rendition, of the opinions hereto appended and reference to the evidence as specifically adduced in the trial below as follows, will enlighten the court. Suffice it to say, however, for the purposes of this petition, among its defenses petitioner asserted that the conduct of Musgrove and Cadenhead, as complained of in the two suits against them hereinabove referred to, was of a fraudulent nature and therefore they were not entitled to the protection afforded under National Surety Corporation's policy covering the negligent acts, errors or omissions of its assured on account of the stipulation therein providing:

> "7. Exclusions. This insurance shall not apply in respect of any claims * * * (b) Brought about or contributed to by the dishonesty, fraudulent, criminal or malicious act or omission of the assured or any employee of the assured."

Petitioner also insisted that the decision of the Court of Appeals in **Continental Casualty Company v. Holmes**, supra, constituted a judicial estoppel against the litigants claiming that the behavior of Musgrove and Cadenhead was the equivalent of "negligent acts, errors, or omissions" contemplated by the policy, since the Court of Appeals, in its opinion, binding on the parties hereto and their privies, wrote that under the undisputed evidence in the Holmes case which was exactly the same in the case at Bar "* * * **Musgrove knew that he did not have authority to accept risks and make contracts for Continental** * * *" and further that "**no written or spoken words or other conduct of Continental Casualty which reasonably interpreted caused Musgrove to believe that Continental de-**

sired him to act on Continental's account as General Agent."

Petitioner additionally contended that if the holding of the Court of Appeals in **Continental Casualty Company vs. Holmes,** supra, did not create an estoppel by judgment, nevertheless the District Court in the instant case under identical proof was bound to construe the evidence to the same effect as it was interpreted by said court in the Holmes case, and to deduce therefrom that the acts of Musgrove and Cadenhead were deliberate and intentional and, therefore, could not be characterized as negligent.

The trial judge overruled petitioner's motion for a directed verdict at the close of the evidence and submitted the aforementioned issues to the jury for resolution, with the same being decided adversely to National Surety Corporation. An appeal was then prosecuted and it is for a review of the action of the United States Court of Appeals for the Fifth Circuit, affirming the judgment of the District Court, and in reference to certain particulars that the writ here prayed for is sought. A brief discussion of the evidence follows.

On the trial below it was shown that in June of 1955 the respondents W. T. Musgrove and William R. Cadenhead became partners in what was known as Musgrove Insurance Agency in Florence, Alabama. This partnership was terminated in 1957 (R. 77). Cadenhead had been a high school coach and teacher for five years before entering the insurance business with Musgrove and prior to that time had not had any experience in the insurance field (R. 173-174). Oliver Wendell Holmes was a customer of the agency (R. 176) and, along with his employer, National Pool Equipment Company, was considered Musgrove's account. At the time of his death on February 21, 1957, while piloting an airplane, Holmes was the top

salesman for the said National Pool Equipment Company (R. 254-255) and Musgrove had a substantial interest in said concern (R. 501-502).

In February of 1956, after attempting to secure passenger aviation insurance for Holmes in Queen Insurance Company and being declined, Musgrove secured a binder for $50,000.00 in the form of a written commitment from Herbert V. Holland, Jr., representative of the Aviation Travel Accident Division of the Atlanta Branch of Continental Casualty Company and a direct employee in charge of its Southeastern Branch dealing with the particular type of insurance secured. This piece of correspondence is referred to in the margin of the opinion in **Continental Casualty Company v. Holmes**, supra, under footnote 1 on page 72, and it is pointed out in the reported opinion on page 280 thereof, **"Holland and not Musgrove bound the coverage as to Holmes * * *. The company accepted the risk here."** Thereafter, upon application being completed and signed by Holmes, it was sent to Continental which issued a passenger policy on Holmes and returned the same to Musgrove. The contract thus delivered did not relate to pilot coverage and contained the provision **"No agent has authority to change this policy or to waive any of its provisions"**. Note the comment on this in the Court of Appeals' reported opinion in **Continental Casualty Company v. Holmes**, supra, at page 281.

Upon the discovery that the aforementioned passenger policy did not contain a countersignature by a licensed resident of Alabama, Holland telephoned W. R. Cadenhead, Musgrove's partner, on March 9th, requesting that they be returned to Atlanta for proper countersignature (R. 105). There was delay in complying with this request and on April 11, 1956, Holland wrote to Musgrove again, requesting the return of the policy for proper signature.

Thereafter, Holland made the suggestion that Musgrove be licensed as an agent in Alabama, which would allow his countersignature to stand on the policy issued. A license request from Musgrove was subsequently cleared and after Musgrove received the same on May 28, 1956, from Holland these parties had no further contact until February 4, 1957 (R. 99-116 and 133-136). As pointed out in **Continental Casualty Company v. Holmes**, supra, **"Musgrove did not receive any specific instructions from Holland concerning his agency, and had no written agency contract with Continental other than the license issued by the Alabama Department of Insurance."**

On December 10, 1956, Musgrove wrote Holmes a letter concerning policies which the latter had in force at that time and made the point that his aviation accident coverage should be rewritten since Holmes was now flying a plane by himself and the policy in question had been written on a passenger basis and not for a pilot (R. 121, 122). According to Musgrove, he thereafter had a conversation with Holmes on January 3, 1957 in which his good friend and business associate in National Pool Equipment Company stated he wanted aviation accident insurance on a pilot coverage basis, whereupon Musgrove contends that he told Holmes he was covered from then on (R. 126-127) and that he thereafter made a notation of his alleged conversation with his customer and turned it over to his partner, Billie Cadenhead, for processing (R. 129-131).

Musgrove also testified that from May of 1956 until January 3, 1957, when he had discussions with Holmes, he did not receive any instruction manual or materials from Continental Casualty Company, nor was he ever directed as to how he was to go about the business of his said insuror at all prior to the death of Oliver Wendell Holmes (R. 133-136). According to Musgrove, subsequent to Jan-

uary 3, 1957 he had no further contact with the matter of obtaining pilot's accident coverage for Holmes until the night of February 20, 1957 (R. 136-137). The record reveals that during this period Cadenhead wrote Continental on January 4, 1957 stating: **"It is Mr. Holmes' wish to also have pilot coverage under the policy, so will you please send us the necessary applications to have completed, or advise us what information you need. I am not sure what kind of plane he is flying, but will secure this for you if necessary."** This was Plaintiff's Exhibit 13 on the trial below and is referred to in the reported opinion in **Continental Casualty Company v. Holmes**, supra, at page 274.

It further appears from the testimony that thereupon Holland answered Cadenhead on January 7th with the letter which was offered as Plaintiff's Exhibit 14, stating:

> "We will be delighted to entertain Mr. Holmes' application for pilot coverage. I am enclosing another application which we would like to have him complete and also a pilot's history form which also must be submitted.
>
> "Depending upon Mr. Holmes' experience and need for the insurance, it is possible that our Underwriters would not like to write as much as $50,000 principal sum for pilot. Completion of these two forms will help determine this. If he should need only $25,000 while piloting, for that is all that could be written, we would be able to reduce the principal sum under the present policy to $25,000. All the present coverage is included in the pilot policy, so that he would have $50,000 just as he now has $25,000 piloting. Of course, this is all problematical.
>
> "Please let me know if I can be of further help."

Musgrove further testified that on the night of February 20, 1957 he had a discussion with Holmes concerning the

application which had been partially filled out by Cadenhead and particularly the question **"Do you understand and agree that no insurance will be effective until the policy is issued?"**, wherein Cadenhead had inserted the answer **"Yes"** and that thereupon Musgrove told him that the **"Yes"** referred to would not make any difference because he was under binder and it was just a mere formality of getting the document or policy to him (R. 143). In addition to this admission, Musgrove also stated: **"And after that Mr. Holmes was satisfied with that, and I reaffirmed him at that time that 'you are covered flying as a pilot'"** (R. 145).

The foregoing took place on the night of February 20th and with reference to the application and pilot's form, Musgrove testified that he put them in his pocket, carried them to work the next morning and placed them on his desk for processing. This was on February 21, 1957, the day when Oliver Wendell Holmes was killed while flying as a pilot. He had signed the application the night before containing his admission that he understood and agreed that no insurance would be effective until the policy was issued, and his application form was lying on the desk of his friend Musgrove at the time Holmes met his death (R. 148-149).

The record discloses that immediately after learning of the event of Holmes' death, Musgrove gathered all the material relating to his friend's aviation coverage in one file and dispatched Cadenhead on the next business day thereafter to Atlanta, Georgia, where he first consulted Holland of the Continental Casualty Company concerning the problem of what he and his partner had done. His next step, on the same date, was to visit the office of the petitioner, National Surety Corporation, also in Atlanta, to give notice of a potential claim against the respondents under their agents' malpractice policy with said company.

According to Cadenhead, he did this despite the fact that Mr. Holland had not made any assertion one way or the other about Continental Casualty Company's position with respect to what he and Musgrove had done, although he had related to him what had occurred with respect to their attempt to orally bind Holmes for pilot's coverage (R. 216-223).

In the course of the trial in the District Court, the respondents Musgrove and Cadenhead were not able to adduce any evidence from other insurance agents in the locality to the effect that it was the practice to make oral binders of accident insurance. The Court of Appeals, in **Continental Casualty Company v. Holmes**, supra, held, however, as a matter of law, that the giving of oral binders on accident and health insurance was not the custom in the industry of Alabama during the period of inquiry.

The testimony of Holland, the Manager of the Accident and Health Division of the Atlanta Branch Office of the Continental Casualty Company, was to the effect that he himself was a direct employee of the insuror bound Holmes for his passenger coverage, that he did not at any time engage in any discussion with either Musgrove or Cadenhead regarding authority for them to make oral contracts of insurance for the Continental Casualty Company (R 389) and that all underwriting of aviation accident insurance relating to pilot's coverage by his company was either done in Atlanta or Chicago (R. 389). He also testified that during the period when he had contact with the Musgrove Insurance Agency beginning in early 1956 and extending through February, 1957, he himself did not have any authority from Continental to extend to any agent permission to bind aviation insurance relating to pilot's coverage. These facts are also referred to in the reported opinion of the Court of Appeals in **Continental Casualty Company v. Holmes**, supra (R. 280-281).

The foregoing constituted undisputed evidence given in the trial and none of the entire testimony was in conflict with that adduced in **Continental Casualty Company v. Holmes**, supra. We have here, therefore, the situation where the Court of Appeals for the Fifth Circuit was dealing with the same proof in both cases, involving identical parties, or at least those who stood in privity.

For the purpose of this petition and to the end that the question concerning the denial of the Court of Appeals of the right of a non jury trial to the petitioner may be considered, it is thought necessary to refer to the course of events raising this point. When Musgrove and Cadenhead initially filed their Bill for Declaratory Judgment under the Alabama Act, hereinbefore referred to, they did not demand a trial by jury. The petitioner removed the case to the United States District Court for the Northern District of Alabama, and filed an answer traversing numerous averments in the Bill and setting up as one of its defenses that the fraudulent conduct of the respondent agents barred their right to claim the benefit of their errors and omissions coverage in National Surety Corporation as protection against the liability suits of Mrs. Gladys Leith Holmes and Continental Casualty Company which had been filed against them on account of their unauthorized attempt at an oral binder of insurance invalidated by **Continental Casualty Company v. Holmes**, supra.

After the case reached the U. S. District Court, no jury demand was made by the petitioner in its answer to the Bill for Declaratory Judgment nor did Mrs. Gladys Holmes Southwick (formerly Gladys Leith Holmes) or Continental Casualty Company as respondents thereto. Many months after her initial appearance and subsequent to all controverted facts being made an issue by the answer of National Surety Corporation, Mrs. Gladys Holmes South-

wick finally did interpose a demand for a trial by jury and, thereupon, National Surety Corporation promptly filed a motion to strike the same on the grounds that it was untimely and that she did not have a right to a jury trial on account of the fact that the matter involved in the action was of equitable cognizance merely. The trial judge ruled adversely to this motion and was sustained by the Court of Appeals, with the suggestion in its opinion that perhaps Appellant's remedy was a motion to remand the case for a non jury trial. This was subsequently made and presented to the Court of Appeals contemporaneously with the petitioner's application for a rehearing by that court, the same being overruled without comment.

REASONS FOR GRANTING THE WRIT.

I.

A litigant's right to a non jury trial concerns a unique matter of major importance, and particularly when the decision of a Court of Appeals is in conflict with those of other subjects, as well as the law of the State where the action is brought.

No demand for a jury trial was made by Messrs. Musgrove and Cadenhead when they brought this action in the Circuit Court for the Eleventh Judicial Circuit of Alabama under the Alabama Declaratory Judgment Act, Title 7, Sec. 15-168, of the 1940 Code. National Surety did not request a jury when it filed its answer nor did Continental Casualty Company. Several months after the case had been removed to the District Court and just five days prior to the pretrial hearing, Mrs. Southwick first appeared in the case, filing a demurrer accompanied by a demand for a jury trial (R. 61-62). This respondent was the only party seeking a trial by jury and her demand was not timely filed as required by Rules 38 (b)

and 81 (c) of the Federal Rules of Civil Procedure. Petitioner promptly interposed its motion to strike the jury demand on the ground that the same was presented too late and that Mrs. Southwick was not entitled to a jury trial (R. 67).

Following the Uniform Declaratory Judgment Act, the Alabama Legislature provided that issues of fact in declaratory judgment proceedings may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions. See Title 7, Sec. 164, Code of Alabama 1940 (Appendix B). It has long been established in Alabama practice, as elsewhere, that jury trials are not available for the determination of issues of fact in equitable proceedings. **Lucas v. Scott**, 247 Ala. 143, 24 So. 2d 540. Numerous United States Court of Appeals have held to the same effect and this principle is so well engrafted in our law that it cannot be doubted. See **Howard v. U. S.**, 214 F. 2d 759 (10 C. A.); **City of Morgantown v. Royal Insurance Company**, 169 F. 2d 713 (4 C. A.), and **Humble Oil & Refining Company v. Sun Oil Company**, 491 F. 2d 705 (5 C. A.).

It is well established that Alabama procedure does not permit a jury trial in an action against a liability insurance company, brought by the judgment creditor of the insured. Such a remedy must be cast under Title 28, Sec. 12, of the Code of Alabama of 1940 (Appendix B), which enables the judgment creditor to proceed in equity only. A case directly in point on the problem here presented is **Reed v. Hill**, 262 Ala. 662, 80 So. 2d 728.

In the **Reed** case a liability insurance company brought a Bill for Declaratory Judgment to determine whether it was liable to defend an action at law brought against its insured by Reed. Reed's demand for a trial by jury was denied by the trial court and he filed a petition with the

Supreme Court of Alabama for a writ of mandamus to the trial judge. In its denial of the writ the Alabama court held that the only possible action Reed had against the insurance company was as a judgment creditor of the insured in a statutory proceeding of equitable garnishment, namely, through the medium of Title 28, Sec. 12, of the Alabama Code of 1940, hereinbefore referred to. Mrs. Southwick's position in the instant case is exactly that of Reed, for her only right of action against National Surety, in the event she recovers from Musgrove and Cadenhead, will, of necessity, be predicated upon the same statutory provision for enforcement of her equitable lien against the proceeds of the policy.

The holding in **Major v. Standard Accident Insurance Company**, 272 Ala. 22, 128 So. 2d 105, where a jury trial of the issues in a declaratory judgment proceeding for the construction of a liability insurance policy was allowed, is clearly distinguishable from **Reed v. Hill**, supra, on two points. First, the policy in the **Major** case contained an express provision to the effect that any person securing a judgment would be entitled to recover under the policy. See **Pennsylvania Threshermen and Farmers Mutual v. Crapet**, 199 F. 2d 850 (5 C. A.). Petitioner's policy issued through the Musgrove Insurance Agency does not contain any such provision. Secondly, the demand for a jury in the **Major** case was made by the insured rather than the claimant. The insured would have a constitutional right for a jury trial in an action at law against the insurance company for breach of contract.

For a case of like import, involving the Federal law, see **State Farm Mutual Auto Insurance Company v. Mossey**, 195 F. 2d 56 (7 C. A.), cert. den. 344 U. S. 869, 97 L. Ed. 674, 73 S. Ct. 109, where one Dubois was denied a jury trial in a proceeding brought by a liability insurance company under the Federal Act against its insured and Dubois. The

basis for the holding there was that the relief prayed for was of traditional equitable cognizance. Whether proceeding under the Alabama or Federal Declaratory Judgment Act, the right to a trial by jury depends upon the basic context in which the issues are presented. See **Moore's Federal Practice** (2nd Edition), 38.29; **Borchard Declaratory Judgments** (2nd Edition), pp. 399-404. It cannot be doubted that the rule obtains that where the issues between the parties to be determined is of an equitable nature merely the right to a trial by jury does not exist. It was, therefore, error for a trial judge to ignore petitioner's right to a non-jury hearing by the court and this mistake was compounded by the Court of Appeals' refusal to remand this case to the lower court for a non-jury disposition on petitioner's motion duly filed.

It may well be argued that with the decision of the Court of Appeals in this case establishes Federal law for the Fifth Circuit to the effect that in actions of this character the issues between a person occupying the role of a judgment creditor and an insurance company as here will not be considered a matter of equitable cognizance and, therefore, the right to a trial by jury on the part of such a person will prevail. This being the case, then there is a conflict as to the law involved between the Circuits in view of **State Farm Mutual v. Mossey**, supra, from the Seventh Circuit to the contrary and there is likewise a conflict between the Fifth Circuit and the State law of Alabama, both of which should be resolved. It is further submitted that there is a general disharmony among the Courts of Appeals for the various Circuits on the question of whether or not State or Federal law shall determine the existence of a right to a jury trial in a diversity action in a United States District Court. See **Barron & Holtzoff, Federal Practice and Procedure**, Vol. 2 B, Sec. 871.1, and the numerous cases cited under

Note 14 from different Circuits holding both ways. For instance, **Order of United Commercial Travelers of America v. Duncan**, 221 F. 2d 703 (6 C. A.), rules that State law governs whether an issue is for jury or for court, as opposed to **Bowie v. Sorrell**, 209 F. 2d 49 (4 C. A.), holding that Federal law rather than State law is controlling as to whether a party has a right to a jury trial.

In the instant case, the relief prayed for in the Bill for Declaratory Judgment filed by Musgrove and Cadenhead in the State court is that Mrs. Southwick be enjoined from further prosecuting her action brought against them for damages there (R. 13). This is the only relief prayed against Mrs. Southwick, and the trial judge held that a claim for such injunctive relief against her lacked substance and had no bearing on the determination of the issue as to the removal of the action (R. 55), stating, as set out in **Musgrove v. National Surety Corporation**, 191 F. Supp. 1, as follows:

> "* * * The injunctive relief involved only Mrs. Southwick's right to proceed in her case against Musgrove and Cadenhead. The National Surety Corporation is not a party to that suit.
>
> "Musgrove and Cadenhead do not need, nor are they entitled to, an injunction in their suit in the Lauderdale Circuit Court in Equity against Mrs. Southwick enjoining the prosecution of her suit in the Lauderdale Circuit Court at law against them."

By this order the District Court eliminated any possible issue to be determined upon the trial of the merits of the action for Declaratory relief, which would directly affect Mrs. Southwick in any way. She was not entitled to a jury trial, for as the Court of Appeals for the Fifth Circuit stated in **Bass v. Hoagland**, 172 F. 2d 205:

> "There is, of course, no right to a jury trial when there is no issue of fact to be tried."

It is now well established in Federal practice that litigation which is historically equitable in nature serves to determine what issues are triable by the court, and the common law forms of action serve as guideposts in determining what issues in a civil action are historically legal, and, therefore, triable to the jury if a timely demand therefor is made. **5 Moore, Federal Practice** (2nd Ed.), Sec. 38.11; **Barron & Holtzoff, Federal Practice and Procedure**, Sec. 872, Vol. 2 B. By her demand for a jury, Mrs. Southwick asked for a trial by jury of the issue of whether Musgrove and Cadenhead were entitled to injunctive relief against her. Since the jurisdictional line was first drawn in Westminster Hall, the injunction has been an equitable remedy. **4 Pomeroy's Equity Jurisprudence** (5th Ed. 1941), Sec. 1337. Had not the District Court eliminated this issue, Mrs. Southwick still would not be entitled to a jury trial because her only remedy against petitioner is in equity, under Title 28, Sec. 12 of the Alabama Code of 1940.

Petitioner's application for a rehearing to the Court of Appeals below (R. 697-700) deals vigorously with the subject of the deprivation of its right to a non jury trial. For an interesting discussion of the problem, see Note, **The Right to a Non Jury Trial**, 1961, 74 Harvard Law Review 1176.

The writer of this article seems to draw the conclusion that Mr Justice Black's opinion in **Beacon Theaters, Inc. v. Westover**, 359 U. S. 500, 79 S. Ct. 948, 3 L. Ed. 2d 988, stands for the proposition that the Supreme Court does not concede a litigant may, in an appropriate situation, have an inviolate right to a non jury trial as a matter of law. We cannot believe that Beacon can be tortured to this extreme for the reason that there in the case under consideration issues both of legal and equitable cognizance were present. It appears to us the Court has, through

its opinion in the Beacon Theaters case, simply expressed a strong caveat that a party's right to a jury trial, as guaranteed by the Seventh Amendment to the Constitution, may not be impaired by the consolidation of matters sounding in equity with those triable in law only.

Our case here is distinguishable in that the Bill for a Declaratory Judgment instituted by the respondents, Musgrove and Cadenhead, under the Alabama Act, does not have, within its framework the first scintilla of a legal issue between the only party who demanded a trial by jury (though most tardily) and your petitioner, which moved the District Court to strike her jury demand. Only matters and things of equitable cognizance can be litigated between Mrs. Southwick and National Surety Corporation in this case as the pleadings are presently cast, or any way they could ever be amended. In other words, insofar as petitioner and the respondent Southwick are in anywise involved in this controversy, her remedy against National Surety Corporation must necessarily always be in equity and under Title 28, Sec. 16 of the Alabama Code.

We submit that the language employed by Mr. Justice Stewart in the dissent in the Beacon case is peculiarly applicable to the rights of the petitioner as prayed for here, wherein the Opinion states:

> "Like the Declaratory Judgment Act, the Federal Rules reserve inviolate the right to trial by jury in actions historically cognizant at common law as under the Constitution they must. **They do not create a right of trial by jury where that right 'does not exist under the Constitution or Statutes of the United States.'**"

Nothing has intervened insofar as Mrs. Gladys Holmes Southwick is concerned in this case to create for her a

right of trial by jury where that right "does not exist under the Constitution or Statutes of the United States." Accordingly, we request this Court to clarify any doubt on this point which may have been created by the Court of Appeals for the Fifth Circuit in this case, relying on **Beacon Theaters v. Westover**, or any other decisions likewise inapposite.

Petitioner's complaint that the jury demand in this case was not seasonably filed has been ignored by the Circuit below.

The timeliness of Mrs. Southwick's jury demand is governed by two rules. Both of them, namely, Rule 38 (b) and Rule 81 (c) have the effect of requiring any party wishing to controvert an issue to file a demand for trial by jury within ten days after service of the last pleading directed to such issue. Mrs. Southwick was several months late in filing her jury demand and to allow the same, is to ignore the basic purpose of the Federal Rules of Civil Procedure. A jury demand which is not made until after service of the last pleading directed to an issue triable by jury and after pre-trial hearing, as we have here, is not entitled to be considered. See **May v. Melvin**, 141 F. 2d 22.

Had Mrs. Southwick been entitled to a jury trial, her failure to serve and file the demand in proper form and within the time allotted resulted in a waiver of that right. **U. S. v. Moore**, 340 U. S. 617, 71 S. Ct. 524, 95 L. Ed. 582. It cannot be contended that the verdict of the jury may be considered as advisory under Rule 39 (c) because not only does the record of the trial defy this suggestion, the judgment of the District Court fails to comply with Rule 52 (a).

II.

Consistency and uniformity in our law demands that our Courts of Appeals do not have inner conflicts with their own decisions and particularly when there is no logical attempt to reconcile the holdings or to indicate that one is to supersede the other.

It is realized that ordinarily a conflict between decisions of the same Court of Appeals is not a basis for granting a writ of certiorari, since the later decision in point of time is considered controlling within that Circuit. A serious quandry arises, however, when the last holding of the Circuit does not purport to alter the earlier ruling of the court, and no effort is made to distinguish the contradictory holdings. Here, the Court of Appeals has ignored the request in petitioner's application for rehearing that the inherent contradictions in **Continental Casualty Company v. Holmes**, 266 F. 2d 269, and **National Surety Corporation v. W. T. Musgrove and William R. Cadenhead et al.**, 310 F. 2d 265 (Appendix A), be settled through an en banc sitting of the entire Court of Appeals for the Fifth Circuit. See Application for Rehearing (R. 689). The later panel which rendered the decision in the present case certainly did not defer to the holdings of the earlier panel in the Holmes case. We submit, therefore, the court below has not followed the sound suggestion of Mr. Justice Harlan in **"Manning the Dikes"**, 13 Record of NYCBA 541, 552 (1958). We, therefore, must resort to this higher tribunal for relief.

We fully realize the obstacles present in attempting to invoke the doctrine of collateral estoppel by judgment when the ideal situation of identical parties and exactly the same issues is not presented. Be that as it may, the Court below has placed itself in an incongruous position by its interpretation of the evidence and conclusions

drawn therefrom as applied in the instant case and as compared to the treatment given by the same Appellate Court to the same facts as adduced in the Holmes case. Petitioner writes in righteous indignation concerning the "about face" policy of the Court of Appeals in this connection in its Application for a Rehearing (R. 674-679).

The evidence in this case conclusively shows that the claims of Mrs. Southwick and Continental Casualty Company are not predicated upon any negligent act, error, or omission of the respondents Musgrove and Cadenhead, but instead, they arise from the intentional conduct of these parties in falsely representing to Holmes that he was covered by pilot insurance. The Court of Appeals ascertained in **Continental Casualty Company v. Holmes**, supra, **on the same proof involved here**, that Musgrove knew he had no authority to orally bind Continental Casualty Company to such insurance. The gravamen of the charges made by Mrs. Southwick and Continental Casualty Company in their action is based upon the statements made to Holmes by Musgrove, deliberately and intentionally, with the knowledge that they were false or with reckless indifference to the accuracy of the same.

Whatever choice of words may be used in defining negligence, it is well established that it is not the same as intentional conduct, "for on the contrary, negligence excludes the idea of intentional wrong. The absence of an intent or purpose to inflict the injury of which the complaint is made is essential to the legal conception of negligence, is the, or a, distinguishing characteristic thereof, and is an element which distinguishes it from other torts, since, where an intention to inflict the injury exists, whether the intention is actual or constructive only, the wrongful act is not negligent, but one of violence or aggression or is fraudulent, willful or wanton." **65 C. J. S., "Negligence"**, Sec. 3, page 331.

There is no possible doubt but what the acts of Musgrove and Cadenhead in stating to Holmes that he was covered by Continental Casualty Company were intentionally and designedly done. Judge McDermott of the Tenth Circuit, writing the opinion in **Anderson v. Commissioner of Internal Revenue**, 81 F. 2d 457, said:

> "This finding of negligence negatives the contention that the damage was occasioned by the willful or intentional act of Anderson. Negligence and wilfullness are mutually exclusive terms * * *. 'Negligence and wilfullness are the opposites of each other.' They indicate radically different mental states."

In **Continental Casualty Company v. Holmes**, supra, the Court of Appeals stated:

> "There was also undisputed evidence to show that Musgrove knew that he did not have actual authority to accept risks and make contracts for Continental * * *.
>
> * * * * * * * * *
>
> "There were no 'written or spoken words or other conduct of Continental Casualty Company' which, reasonably interpreted, caused Musgrove to believe that Continental desired him to act on Continental's account as a General Agent.'"

The evidence in this case was the same as it was in the Holmes case, therefore, since it was substantial and undisputed the petitioner was entitled to its motion for a directed verdict, on the ground:

> "3. It affirmatively appears from substantial evidence adduced in this case that the conduct of the plaintiffs for which they seek to have insurance adjudicated on their behalf in this action was of a wilful

and intentional nature and did not constitute negligent acts, errors, or omissions as contemplated by the policy sought to be declared."

It is a most undesirable situation for a court to vacillate from one pole to another as the Fifth Circuit has done by taking such a contrasting view of the same evidence in the case at Bar and in **Continental Casualty Company v. Holmes**, supra. We humbly submit the Court of appeals has, by such self-contradiction placed itself in a posture as to make it the Supreme Court's responsibility to review the actions of the Court below in this regard by issuance of writ of certiorari.

III.

A Court of Appeals should not, in a removal action based on diversity of citizenship, do violence to the doctrine of Erie v. Tompkins, by substituting its own artificial interpretation as to the law of the controlling forum, when its decision is in conflict with both the statutes and case precedents establishing public policy of the State involved.

In the instant case the exclusion in its policy plead in bar by National Surety Corporation to the claim of coverage on the part of respondents Musgrove and Caldenhead was plainly stated as follows:

> **"This insurance shall not apply in respect of any claim * * * brought about or contributed to by the * * * fraudulent * * * act or omission of the assured * * *"**

This language being without ambiguity is not to be narrowly construed as the Court below suggests.

Under the evidence, viewed as it must be in the light most favorable to the respondents, the conduct of Messrs.

Musgroye and Cadenhead was at least fraudulent according to the standards set forth in Title 7, Sec. 108 of the Code of Alabama of 1940 (Appendix B) providing:

> **"Misrepresentations of a material fact, made wilfully to deceive, or recklessly without knowledge, and acted on by the opposite party, or if made by mistake and innocently and acted on by the opposite party, constitute legal fraud."**

This is but a statutory pronouncement of what has long been the common law of Alabama, as established in many cases. See **Bayless Machine & Welding Company v. Huntsville Ice & Coal Company**, 265 Ala. 383, 91 S. 2d 483; **Rudman v. Hooks**, 252 Ala. 280, 40 S. 2d 866; **Gulf Electric Company v. Fried**, 218 Ala. 684, 119 So. 685, and **Ball v. Farley**, 81 Ala. 281, 1 So. 253.

An often quoted statement by Mr. Justice Storey, in his treatise on **"Equity Jurisprudence"** Section 193, is as follows:

> "Whether the party thus representing a material fact knew it to be false, or made the assertion without knowing whether it was true or false, is wholly immaterial: for the affirmation of what one does not know or believe to be true is equally in morals and law, as unjustifiable as the affirmation of what is known to be positively false."

This principle is quoted in **Read v. Walker**, 18 Ala. 323, 332, which cites the leading Alabama case of **Monroe v. Pritchett**, 16 Ala. 785, 789, where the court said:

> "He who affirms either what he does not know to be true, or knows to be false, to another's prejudice and his own gain, is both in morality and law, guilty of falsehood, and must answer in damages."

See also **Draughon's Business College v. Battles**, 37 Ala. App. 24, 68 So. 2d 58, cert. den., 259 Ala. 618, 68 So. 2d 62; and **Hardin v. Belcher**, 195 Ala. 186, 70 S. 141.

The various kinds of fraud which have been evolved by the courts in seeking to relate the degree of moral guilt to the liability imposed find no place under Alabama law. **23 Am. Jur., Fraud and Deceit**, Secs. 5, 6, pages 756-758.

While it appears to be the general rule that damages will be awarded for misrepresentations only where scienter or the intention to deceive is present (23 Am. Jur., Fraud and Deceit, Sec. 116, pages 899-902), it is firmly resolved by Alabama decisions that damages are recoverable even where there is no such intent. **Fraudulent conduct in Alabama is distinguished only with regard to liability for punitive damages for which recovery is restricted to actions for gross fraud under the deceit Statute.** See **Boriss v. Edwards**, 262 Ala. 172, 77 So. 2d 909, and the cases discussed therein.

Whether the representations made by Musgrove to his friend Holmes, relating to his alleged right to orally bind the latter in Continental Casualty Company for pilot's accident coverage were innocently, recklessly, or intentionally made, the fact remains they were not true as has been adjudicated in **Continental Casualty Company v. Holmes**, supra, and Holmes relied upon the same to his detriment. This breach of his confidential relationship with Holmes and his position of trust by Musgrove, under the authority of **Fidelity & Casualty Company v. J. D. Pittman Tractor Company**, 244 Ala. 354, 13 So. 2d 669, would entitle Mrs. Gladys Holmes Southwick to a directed verdict against Musgrove and Cadenhead in an action premised on Sec. 108 of Title 7 of the Code of Alabama, supra. Hence, in the instant case, petitioner was entitled to a reversal in the Court of Appeals on account of the

failure of the District Judge to have granted its motion for a directed verdict.

The Court of Appeals, in order to allow Musgrove and Cadenhead to escape the impact of the exclusionary provision in petitioner's policy, exempting coverage for claims arising out of fraudulent acts rationalizes in its opinion in the instant case (Appendix A) that the policy exclusion does not contemplate **"constructive or legal fraud."** In thus shielding Messrs. Musgrove and Cadenhead from the consequences of their fraudulent conduct in this case, where an insurance corporation is involved, the Court below circumvents the announced public policy of the State of Alabama as codified by the aforementioned statute and enunciated time and again in a legion of cases from the appellate courts of this State.

Why has there come about in our law the distinction of a certain specie of human conduct as "constructive fraud"? In one of the earliest Alabama reports we find the Supreme Court of this State, in **McBroom and Turner v. Rives**, 1 Stew. 72, stating:

> **"A constructive fraud is an act which the law declares to be fraudulent without inquiring into its motives; not because arbitrary rules on this subject have been laid down, but because certain acts carry in themselves an irresistible evidence of fraud."**

The first term of the Supreme Court of Alabama began on the second Monday in May, 1820. Seven years later, Mr. Justice John M. Taylor explained **"constructive fraud"** as hereinbefore quoted. One hundred and thirty-one years later, we find the Supreme Court of Alabama in a per curiam decision in **Hornaday v. First National Bank of Birmingham, Alabama**, 259 Ala. 26, 65 So. 2d 678, reaffirming its policy so early established by stating:

"Constructive fraud at common law is the breach of a legal or equitable duty which, irrespective of the moral guilty, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interest. It usually arises from a breach of duty where relationship of trust and confidence exists."

We find that the Court of Appeals of Alabama in **Inter-Ocean Casualty Company v. Banks**, 32 Ala. App. 225, 23 So. 2d 874, asserting that **fraud is a relative term** which includes all acts and omissions involving a breach of legal duty injurious to others.

We submit that the Court of Appeals for the Fifth Circuit has no right, and, indeed, violates the prerogative of the Legislature and the Appellate Courts of Alabama, when it attempts to assert for this State that the term **"fraudulent act"** contained in an insurance policy exclusion is not to be construed against the individual insured to mean the same thing as the plain wording of an Alabama statute declaratory of the innumerable cases in this State holding that misrepresentations of a material fact, even though made by mistake and innocently, if acted on by the opposite party, constitute fraud.

Such an infringement on the sound public policy of the State of Alabama should not be tolerated by this court. The Fifth Circuit should not be allowed to engraft its own exception into the statutory and common law of Alabama relating to fraud and deceit. The holding of the Court of Appeals in this case is in conflict with the decisions and statutes of Alabama and this should not be permitted unless for a sound and over-reaching reason, and none is suggested by the opinion of the Court below, nor can there be for there are none.

It is common knowledge that insurance companies have long been the prey of juries. It is to be hoped that our Courts will not discriminate between such corporations and individuals. The purport of the opinion of the Court of Appeals in the instant case, however, is to favor the individual over the insurance company, and the result thereby is to deprive the petitioner of its property without due process of law, in violation of its rights secured by the Fifth Amendment to the Constitution of the United States. This certainly should not be condoned by the failure of our Supreme Court to issue a writ of certiorari in order to review this serious trespass upon the rights of the petitioner corporation, and to determine if, indeed, the Court of Appeals has not, by its opinion, interfered with the sound and salutary public policy of one of our United States.

CONCLUSION.

Although the **Beacon** case may suggest to some that it is the view of this Court that there is no such thing as a constitutional guaranty of the right to a **non-jury** determination, the decision and its dissenting opinion leaves others in doubt that such is the philosophy of our Supreme Court. **While it is clear that there are court created and statutory rights to a non-jury trial, as we have herein demonstrated, nevertheless, a review by this Court is necessary to dispel all lingering doubt on the point and to establish the boundaries of such a prerogative.** Petitioner believes the conflict in the law relating to such a vital issue to be such that it becomes the duty of our Supreme Court to lay the matter to rest, hence this petition.

Counsel for petitioner has just come upon **Dairy Queen, Inc. v. Wood**, 369 U. S. 470, 82 S. Ct. 894; and a case note thereon in the **Alabama Law Review, Vol. XV, Spring 1963, Number 2**, and from a study of the decision and

case notes thereon mentioned is even more impressed with the impelling necessity of the Supreme Court considering explicitly the problem of a litigant's right to a non jury trial as herein advanced. Dairy Queen and Beacon muddle the picture because in each of said cases it was ultimately decided that there was an issue of a legal nature to be decided wherefore a jury trial, as a matter of right by the litigant making timely demand, could not be avoided on account of the contended presence of a nature traditionally cognizable in equity. **Here we have a situation where the sole issue between the respondent demanding the jury trial and petitioner is of an equitable nature only.** We earnestly submit, therefore, that this presents an appropriate opportunity for the Court to resolve the problem of a petitioner's right to a non jury trial once and for all.

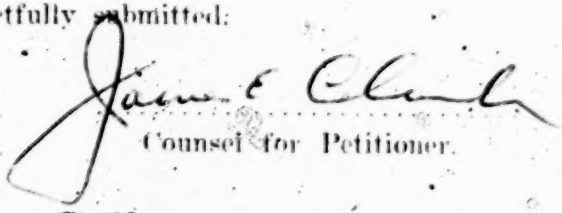
The turn around of the Fifth Circuit in its interpretation of the same set of facts which were presented in both **Continental Casualty v. Holmes**, and the instant case is so shocking as to merit investigation by this Court through the extraordinary writ of certiorari. Such self contradiction as has been practiced by the Court below in its judging of these two cases tends to confuse the Bar, to undermine its confidence in the Court, and to make the value of the remedy of appeal extremely doubtful. Such a serious consequence in our humble judgment makes review by this Court worthwhile and on this basis relief by certiorari is prayed.

The temerity of the Court of Appeals for the Fifth Circuit in doing violence to the public policy established by Legislature and by judicial precedents from the State Appellate Courts of Alabama relating to the law of fraud and deceit should not go unchallenged nor should the discrimination practiced against the petitioner insurance company herein be tolerated. The problem being of major

concern surely justifies issuance of the writ prayed for so that the grave conflict between the United States Court below and Alabama may be resolved.

For the foregoing reasons, petitioner prays that its petition for certiorari be granted.

Respectfully submitted:

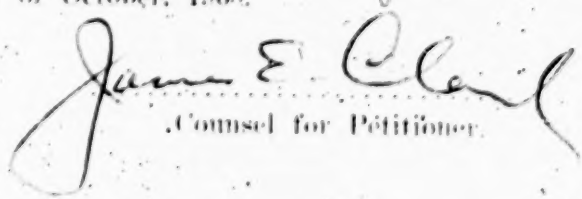


Counsel for Petitioner.

Certificate.

I hereby certify that a true copy of the foregoing petition for a writ of certiorari has been served upon Messrs. Lange, Simpson, Robinson & Somerville, Attention Mr. Reid Barnes, Exchange Security Bank Building, Birmingham 3, Alabama, Attorneys of Record for Continental Casualty Company. I also certify that a true copy thereof has been served upon Messrs. Mitchell, Poellnitz & Cox, Attorneys of Record for Musgrove Insurance Ageney, a partnership composed of W. T. Musgrove and W. R. Cadenhead, and W. T. Musgrove and W. R. Cadenhead, Individually. I further certify that a true copy thereof has been served upon Messrs. Hare, Wynn & Newell, Attention Mr. Neal Newell, Seventh Floor City Federal Building, Birmingham 3, Alabama, Attorneys of Record for Mrs. Gladys Holmes Southwick (formerly Mrs. Gladys Leith Holmes).

This the 17 day of October, 1963.



Counsel for Petitioner.

APPENDIX A.

Opinion 1. 310 F. 2d 256.

In the
United States Court of Appeals
For the Fifth Circuit.

No. 19,409.

National Surety Corporation,
Appellant,
versus
W. T. Musgrove and William R. Cadenhead, Individually and as Partners Doing Business as Musgrove Insurance Agency et al.,
Appellees.

Appeal From the United States District Court for the Northern District of Alabama.

(October 17, 1962.)

Before Cameron, Wisdom, and Gewin, Circuit Judges.

Wisdom, Circuit Judge: This appeal is a sequel to **Continental Casualty Company v. Holmes**, 5 Cir., 1959, 266 F. 2d 269, and to **Continental Casualty Co. v. Musgrove**, 5 Cir., 1962, 305 F. 2d 9. In the case before us now W. T. Musgrove and William R. Cadenhead ask for a declaratory judgment decreeing that National Surety Corporation is obligated to pay any sum between $1,000 and $300,000 which they shall become liable to pay because of their

negligent breach of duty as insurance agents. The jury found for the plaintiffs. National Surety Corporation appeals.

This controversy arose out of a 1957 transaction between Oliver Wendell Holmes and the Musgrove Insurance Agency, a partnership composed of Musgrove and Cadenhead. At that time, Holmes was covered by a $50,000 aviation accident policy, insuring him against accidental death while riding as a passenger in an airplane. Musgrove, who was Holmes's insurance agent, had written Holmes:

> "[Your] Aviation Accident Policy . . . should be rewritten since you are flying a plane by yourself; this is written on a passenger basis, and not a pilot, but you should have this changed to cover you as pilot of the plane, and I would appreciate your considering this and agreeing to change it. It will cost you more money but will give you the protection that is needed."

January 3, 1957, Holmes informed Musgrove that he wanted to extend the passenger policy to include coverage while piloting. Musgrove told him that from then on he was covered while flying as a pilot. Musgrove then gave a pencilled memorandum concerning the conversation to Cadenhead and instructed him to get Holmes's passenger policy endorsed, or a new policy issued whichever was necessary in order to effect the extended coverage. At the same time Musgrove stated to Cadenhead that Holmes had purchased the coverage and was insured by oral binder.

On the following day Cadenhead wrote Continental Casualty Company, with whom Holmes had his passenger policy:

> "It is Mr. Holmes' wishes to also have pilot's coverage under this policy so will you please send us the

necessary applications to have completed or advise us what information you need. I am not sure what kind of plane he is flying, but will secure this for you if necessary."

January 7, 1957, Herbert V. Holland, head of the Atlanta branch of Continental's Aviation-Travel Accident Division, replied as follows:

"We will be delighted to entertain Mr. Holme's [sic] application for Pilot Coverage, I am enclosing another application which we would like to have him complete and also a Pilot History Form which also must be submitted.

"Depending upon Mr. Holmes' experience and needs of the insurance, it is possible that our underwriters would not like to write as much as $50,000 principal sum for piloting. Completion of these two forms will help to determine this. If he should need only $25,000 while piloting, or that is all that could be written, we would be able to reduce the principal sum under the present policy to $25,000. All the present coverage is included in the Pilot Policy, so that he would have $50,000 just as he now has with $25,000 piloting. Of course, this is all problematical."

Cadenhead completed part of the application forms from information in his files. He also answered, "Yes" to Question 12, which was, "Do you understand and agree that no insurance will be effective until the policy is issued?" He later gave the forms to Holmes to be completed, and no more was said about them until February 20, when Holmes brought the application and pilot's history form to Musgrove's office. He inquired specifically about Question 12. Musgrove assured him that he had been covered while flying as a pilot since they first spoke of it and that the "Yes" answer to Question 12 "wouldn't make any difference, because he was under binder, and it was just a mere

formality of getting the document or the policy to him." Musgrove testified that he thought Continental might just endorse the passenger policy, in which case the company would not need the application for a new policy.

The next day, while piloting a plane, Holmes was killed.

Holmes's death resulted in a complicated series of lawsuits. His widow, Mrs. Gladys Leith Holmes Southwick, sued Continental Casualty Company, alleging a valid oral binder by Musgrove. Continental impleaded Musgrove and Cadenhead as third-party defendants, contending that they were unauthorized to make an oral binder and should be liable to it for any judgment rendered in favor of Mrs. Holmes. On appeal, in **Continental Casualty Co. v. Holmes**, 5 Cir., 1959, 266 F.2d 269, this Court set aside a jury verdict for Mrs. Holmes and rendered judgment for Continental. Continental then sued Musgrove for damages sustained in defending the suit, but its action was dismissed in the federal courts for lack of the minimum jurisdictional amount. **Continental Casualty Co. v. Musgrove**, 5 Cir., 1962, 305 F. 2d 9. Three days before the statute of limitations would have barred her claim, Mrs. Holmes brought suit in an Alabama state court against Musgrove and Cadenhead for damages suffered because of their negligent failure or omission to secure an effective binder from Continental. Musgrove and Cadenhead then made demand upon National Surety Corporation to defend the suit in accordance with the terms of the Insurance Agents' and Brokers' Errors and Omissions Policy which they carried with it, and upon National's denial of liability, they brought this declaratory judgment action.

Three clauses of the policy are particularly important. Paragraph One stipulates:

> "This insurance, subject to the terms and conditions hereof, will pay on behalf of the assured all sums

> which the assured shall become obligated to pay by reason of liability for breach of duty as insurance brokers, insurance agents, or general insurance agents, claim for which is made against them during the period stated hereinbefore by reason of any negligent act, error or omission, whenever or wherever committed or alleged to have been committed on the part of the assured. . . ."

Paragraph Five gives the further protection to the insured that "the Company shall defend in insured's name and behalf any suit against the assured alleging such negligent act, error or omission, and seeking damages on account thereof even if such suit is groundless, false or fraudulent. . . ." These protections are, however, limited by the exclusions listed in Paragraph 7, which provides:

> "This insurance shall not apply in respect of any claim
>
> "a. For libel or slander;
>
> "b. brought about or contributed to by the dishonest, fraudulent, criminal, or malicious act or omission of the assured or any employee of the assured, or
>
> "c. by any assurer arising out of any alleged negligent act, error or omission, by the insured in their capacity as insurance agents or general insurance agents, or insurance brokers of that assurer, unless that assurer has obtained a final judgment against the assured in any court in respect of that claim."

National Surety raises three basic defenses to liability under the policy. (1) In regard to liability for damages secured against appellees by Mrs. Holmes or by Continental, National Surety relies upon the Court's statement in **Continental Casualty Co. v. Holmes**, 5 Cir., 1959, 266 F. 2d 269, 281, that "[T]. . . Musgrove knew that he did not have actual authority to accept risks and make contracts

for Continental . . .," as having established by collateral estoppel that Musgrove acted "wilfully" rather than "negligently" in making a purported oral binder with Holmes. (2) National Surety insists that under Alabama law Musgrove's action in assuring Holmes that he was covered while flying as a pilot amounted to fraud, and not mere negligence. (3) National Surety urges that it is not liable under Paragraph 5 for any amount expended by appellees in defending the suit against them by Continental because Paragraph 7 (c) specifically excludes liability on any claim by any insurer which has not been reduced to a final judgment.

If its three basic defenses are not accepted as matters of law, then, according to appellant, the judgment should be reversed for a new trial because of improper rulings made by the district judge on the admission and exlusion of evidence. Finally, National Surety urges that the district judge erred in allowing the jury demand of Mrs. Holmes, who, although originally brought in by appellees as a defendant, was realigned as a plaintiff. The appellant, however, apparently urges this as an error entitling this Court to weigh the evidence **de novo** and does not ask that the case be remanded for a nonjury trial.

I.

There is little merit to appellant's contention that this is a proper case for the application of collateral estoppel. Neither the parties nor the issues are the same in this case as in **Continental Casualty Co. v. Holmes**, 5 Cir., 1939, 266 F. 2d 269. In the earlier case, when Mrs. Holmes attempted to hold Continental on an oral binder by Musgrove, we held that Musgrove had no authority, either actual or apparent, to make such a binder. Here, the issue as between Musgrove and National Surety Corporation is whether Musgrove acted negligently or fraudulently in

purporting to extend coverage. Musgrove, although having no actual or apparent authority to bind Holmes, could have acted negligently, but in good faith, in purporting to bind him. Moreover, the statement relied upon by appellant to prove that Musgrove acted wilfully does not, if taken in context, support appellant's position; much less was it fundamental to the holding in that case. We stated, "There was also undisputed evidence to show that Musgrove knew that he did not have actual authority to accept risks and make contracts for Continental. . . ." 266 F. 2d 269. In other words, there was evidence which was not in dispute showing Musgrove knew of his lack of authority. This statement does not exclude the possibility of other evidence showing that Musgrove did **not** know he lacked authority. It was, at most, an evaluation of the evidence; it did not constitute a holding on an issue basic to the case which could be determinative of a different issue in a later action between different litigants. See **Hyman v. Regenstein**, 5 Cir., 1958, 258 F. 2d 502, 510.

II.

Appellant strongly urges that Musgrove intentionally made a false representation to Holmes concerning his coverage. Both Cadenhead and Musgrove were aware of Question 12 on the application form, "Do you understand and agree that no insurance will be effective until the policy is issued?" and that Cadenhead had written the answer, "Yes." But Musgrove testified that he thought the reservation of coverage would apply only if a new policy were issued, and not if Continental endorsed the passenger policy. Holland had told Musgrove to handle Continental's business as he handled all of his other insurance business and that he wanted him "to be a full agent for the Aviation Accident Division, Special Risk, Department of the Continental Casualty Company to

secure business in Florence, Alabama . . . for his company." Both men were aware that Holland, head of the Atlanta branch of Continental's aviation-travel accident division had effected a binder on the passenger policy procured by Holmes the previous year. On this state of the record, the jury could reasonably find that Musgrove was merely negligent in not ascertaining the extent of his authority before representing to Holmes that he had pilot's coverage.

In this respect, therefore, the present case is similar to **Somer v. New Amsterdam Casualty Co.**, E. D. Mo. 1959, 171 F. Supp. 84. In that case the defendant insurance company denied coverage on a professional insurance policy issued to a psychiatrist. The policy there in question provided that the company would pay "on behalf of insured all sums which insured shall become legally obligated to pay as damages because of injuries arising out of malpractice, error or mistake in rendering or failing to render professional services in the practice of the insured's profession . . ." and would defend "any suit against the insured alleging such injury and seeking damages on account thereof, even if such suit is groundless, false or fraudulent." The damages which the plaintiff sought to collect grew out of a charge that he had made an assault upon a patient by having him committed to a mental sanatorium. This, argued the insurance company, constituted a wilful act which, as a matter of law, was excluded from coverage. The trial judge, however, ruled that exclusions in insurance policies should be narrowly construed, and that the issue constituted a question of fact to be determined by the trier of fact. We agree. The question of whether Musgrove acted negligently or wilfully and fraudulently was a factual issue for jury determination. **Bailey v. United States**, 5 Cir., 1937, 92 F. 2d 456.

This, however, does not dispose of the argument. National Surety insists that more than just ordinary fraud is excluded from coverage. Legal, or constructive fraud is also excluded; and here it relies on §§ 108 and 110 of Title 7 of the Alabama Code of 1940. The first of these sections provides:

> "Misrepresentations of a material fact, made wilfully to deceive, or recklessly without knowledge; and acted on by the opposite party, or if made by mistake and innocently, and acted on by the opposite party, constitute legal fraud."

Musgrove, according to appellant, committed "legal fraud" under this definition when he recklessly assured Holmes that he was under binder without first ascertaining the extent of his authority. In fact, it insists that viewed in its worst light, Musgrove's action constituted deceit, under section 110, which reads:

> "Wilful misrepresentation of a material fact, made to induce another to act, and upon which he does act to his injury, will give a right of action. Mere concealment of such a fact, unless done in a manner as to deceive and mislead, will not support an action. In all cases of deceit, knowledge of a falsehood constitutes an essential element. A fraudulent or reckless representation of facts as true, which the party may not know to be false, if intended to deceive, is equivalent to a knowledge of the falsehood."

It is doubtful, however, that these statutory provisions were meant to apply to a definition of fraud in an insurance policy. Thus, in **National Union Fire Insurance Co. v. Schwab**, 241 Ala. 657, 4 So. 2d 128 (1941), where the insurance company invoked the defense of fraud or false swearing in making proof of loss, urging that there was "fraud in law in affirming as true what is untrue though

not known to be so," the Alabama Supreme Court held that the code definitions had no application in determining the presence of fraud. The court said that "those statutes defining fraud and declaring its effect have reference by their terms to a situation where the opposite party acts in reliance on such representation to his damage." See also **Fidelity & Casualty Co. v. J. D. Pittman Tractor Co.**, Ala. 1943, 13 So. 2d 669, 671, where the Alabama Supreme Court in dealing with section 108 stated that "there is a distinction between suits brought against a party to the contract and suits brought against those not parties to it." Thus, although Musgrove's statement may have constituted fraud as between him and Holmes, it would not necessarily be "fraud" as used in the insurance policy.

We find it unreasonable to believe that the ordinary insurance agent, taking out a policy to protect him in the event of professional negligence, would think that an exclusion "in respect of any claim . . . brought about or contributed to by the dishonest, fraudulent, criminal, or malicious act or omission of the Assured. . . ." would encompass so all embracing a concept as "legal fraud." Words in the policy should be given their ordinary meaning, especially where, as here, the incorporation of the concept of legal or constructive fraud into the exclusion clause would rob the insured of the very coverage he assumed he was getting. Exclusions from coverage are construed against the insurer and in favor of providing the indemnity sought. **New Amsterdam Casualty Co. v. Soileau**, 5 Cir., 1948, 167 F. 2d 767; **Sheehee v. Aetna Casualty & Surety Co.**, W. D. La. 1954, 122 F. Supp. 1. Indeed, cases from this Court, such as **Glens Falls Indemnity Co. v. National Floor & Supply Co.**, 5 Cir., 1956, 239 F. 2d 412, and **United States Fidelity & Guaranty Co. v. Bank of Thorsby**, 5 Cir., 1931, 46 F. 2d 950, which

appellant cites for the proposition that the words "fraud" and "dishonesty" are to be interpreted broadly when used in an insurance policy, actually stand for the proposition that the policy is to be construed in favor of broad coverage. Both cases involved policies indemnifying an employer for any loss sustained because of acts of personal dishonesty of their employees, and the Court gave a liberal meaning to words of **coverage**, not words of exclusion.

As a matter of law, we cannot say that Musgrove was guilty of fraud in his transaction with Holmes, nor did the trial judge commit reversible error in failing to instruct the jury as to sections 108 and 110 of Title 7 of the Alabama Code of 1940.

III.

Does paragraph 7 (c), excluding "any claim . . . by any assurer arising out of any alleged negligent act, error or omission, by the insured in their capacity as insurance agents . . . of that assurer unless that assurer has obtained a final judgment against the assured in any court in respect of that claim," limit paragraph 5, under which the company agrees to "defend in insured's name and behalf any suit against the assured alleging such negligent act, error or omission, and seeking damages on account thereof even if such suit is groundless false or fraudulent. . . ."? We think not. If these clauses are construed together to give meaning to both, the exclusion the appellant urges would apply only to **claims** by Continental against Musgrove and Cadenhead; it does not apply to appellant's obligation to defend at all. Continental's complaint against Musgrove alleged that "it was wrongfully required to expend the sum of $25,000 in the successful defense of . . . [a suit based] upon the unwarranted and illegal action of its agent, Musgrove, in issuing the binder

on Holmes' life," ... F. 2d ..., and listed in detail the circumstances surrounding the transaction. Such pleadings could not be said to exclude on their face the possibility of National Surety's liability under its policy for Musgrove's professional negligence. Thus, National Surety Corporation was obligated to defend Continental's suit for damages against Musgrove; it would be liable to pay such damages as Continental was awarded, however, only when, and if, a final judgment was secured against Musgrove and Cadenhead on the basis of their negligent action. The manifest purpose of such an exclusionary clause is to protect National Surety from liability for trivial claims that it did not intend to prosecute. Once having improperly refused to defend a claim alleging a negligent act, omission or error, appellant cannot then take refuge in the "final judgment" clause and deny liability for the costs of the defense.

IV.

Most of appellant's objections to the trial judge's evidentiary rulings relate to the admission of parts of the record on appeal in **Continental Casualty Co. v. Holmes**, 5 Cir., 1959, 266 F. 2d 269. This Court has consistently ruled in favor of a liberal policy in the admission of evidence, e. g. **Dallas County v. Commercial Union Assurance Co.**, 5 Cir., 1961, 286 F. 2d 388; **Monarch Insurance Co. v. Spach**, 5 Cir., 1960, 281 F. 2d 401, where such evidence is "credible, relevant, probative . . . bearing directly on the truth of a significant issue." **National Surety Co. v. Bellah**, 5 Cir., 1957, 245 F. 2d 936, 941. The appellant itself has relied heavily upon our decision in the **Continental Casualty** case and has urged that our findings there should be binding, or at least of overwhelming weight, on this appeal. We find that the trial judge's rulings on the evidence do not justify reversing and remanding for a new trial.

V.

Finally, the appellant urges that this Court should weigh the evidence anew because of the trial court's error in allowing Mrs. Holmes' demand for a jury. This contention is based upon the proposition that under the Alabama Uniform Declaratory Judgments Act, a jury trial would not have been granted. This Court cannot, however, review the evidence and make findings *de novo*, especially in a case such as this one in which much depends upon the demeanor of the witnesses. See Rives, The Scope of Review of Facts by United States Courts of Appeals, 11 Alabama L. Rev. 70 (1958). If we assume appellant's contention that it was improperly denied a nonjury trial is correct, the logical remedy would be to remand the case for a trial without a jury. Appellant does not, however, request this form of relief. Indeed, such an action would be almost unprecedented. See Note, The Right to a Nonjury Trial, 74 Harv. L. Rev. 1176, 1184-86 (1961). It has been established at least since **Beacon Theatres, Inc., v. Westover**, 1959, 359 U. S. 500, 79 S. Ct. 948, 3 L. Ed. 2d 988, that there is a strong policy in the federal courts favoring trial by jury. Cf. **Byrd v. Blue Ridge Elec. Coop.**, 1958, 356 U. S. 525, 78 S. Ct. 893, 2 L. Ed. 2d 953. The trial judge's allowance of a jury trial did not constitute reversible or remediable error.

The judgment is

Affirmed.

APPENDIX A.

Opinion 2. 266 F. 2d 269.

In the
United States Court of Appeals
For the Fifth Circuit.

No. 17,409.

Continental Casualty Company,
Appellant,
versus
Mrs. Gladys Leith Holmes et al.,
Appellees.

Appeal from the United States District Court for the Northern District of Alabama.

(April 16, 1959.)

Before Rives, Jones, and Wisdom, Circuit Judges.

Rives, Circuit Judge: Appellee, Mrs. Gladys Leith Holmes, as beneficiary, sued the appellant, Continental Casualty Company, for the proceeds of a purported accident and health insurance policy insuring her deceased husband, Oliver Wendell Holmes, while flying as a pilot. She claimed that coverage was in force as a result of an oral binder or oral contract of insurance effected by the Company's agent, W. T. Musgrove, on January 3, 1957, and again on February 20, 1957. Her suit was primarily based on the proposition that W. T. Musgrove, a partner

with W. R. Cadenhead in the firm of Musgrove Insurance Agency, had authority to orally bind the Company. Continental Casualty Company impleaded as third-party defendants the Musgrove Insurance Agency and the two partners individually (appellees here), alleging that none of the third-party defendants had actual authority to make the oral agreement and averred that, if Continental Casualty Company was liable to the plaintiff in this action (such liability being denied) on account of any apparent or ostensible authority, then the third-party defendants are in turn liable in the same amount to Continental Casualty Company.

The trial court submitted the questions to the jury with instructions that if they found the agents to have had either actual or apparent authority to orally bind the Company, the plaintiff would recover, and if they found the authority to be apparent only, then they should also find in favor of the Company in the same amount as against the agents.

The verdicts of the jury were in favor of the plaintiff, assessing her damages at $52,750 and in favor of the third-party defendants. Necessarily, therefore, the jury found that the agents had actual authority to make the alleged oral binder or contract.

Appellant-defendant contends vigorously that there was no substantial evidence justifying submission to the jury on the question of the agents' authority.

The deceased insured, Oliver Wendell Holmes, had prior to 1956 taken out several policies of various kinds of insurance, always using the Musgrove Insurance Agency of Florence, Alabama, to place his insurance. On February 3, 1956, Holmes executed an application for aviation accident insurance for coverage in the sum of $50,000, as a passenger in a certain aircraft, on a form provided by

Queen Insurance Company, for which W. T. Musgrove was agent. Musgrove forwarded this application together with a similar application of James Luther Culver to the Atlanta, Georgia, office of Queen Insurance Company, and this Company, already having considerable exposure under a policy covering the same aircraft, undertook to place this insurance with a friendly competitor, Continental Casualty Company. Mr. Herbert V. Holland, Jr., the representative of the Aviation-Travel Accident Division of the Atlanta branch office of Continental Casualty, was given the information of the two applicants by Queen, and Holland wrote a letter to Musgrove on February 23, 1956, confirming the rates and amount of coverage, enclosing application to be completed and stated that Holmes and Culver both had coverage effective February 17, 1956. This letter appears in the margin.[1] The application was executed by Holmes on February 27, 1956, and forwarded with a letter from Musgrove to Holland on February 29, 1956. The policies were issued and returned to Musgrove.

Upon discovery that these policies did not contain a countersignature by a licensed resident agent of Ala-

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[1] "Oliver Wendell Holmes &
James Luther Culver

"Dear Mr. Musgrove:

"We are holding on binder Aviation Accident coverage for the above-named gentlemen. This provides $50,000.00 Bodily Injury Death and Dismemberment insurance while riding as a passenger in scheduled, non-scheduled, and private aircraft which have Civil Aeronautics Board certification or the foreign equivalent. Each man has $50,000.00, effective February 17, 1956.

"I am writing to ask you to confirm the above and the annual rate per thousand dollars of $1.35. For ease in writing the policies, perhaps you can have the enclosed applications completed and return them to me with your reply. I know that you discussed with Jerry Smith of Royal the possibility of even broader aircraft. If this is desired, I will need to know to what use in what aircraft the men would put the insurance.

"In the meantime, they do have the coverage. Please let me hear from you as soon as possible."

bama. Holland telephoned W. R. Cadenhead, Musgrove's partner, on March 9, requesting that the policies be returned to Atlanta for proper countersignature. There was delay in complying with this request, and on April 11, Holland wrote to Musgrove again requesting a return of the policies for proper countersignature. Upon further delay, Holland wrote Cadenhead on April 30 suggesting that Musgrove be licensed as an agent in Alabama which would allow Musgrove's countersignature to stand. Cadenhead answered on May 3 and gave Holland the necessary information to have Musgrove licensed. Thereafter, on May 7, Holland wrote Cadenhead a general business letter discussing the licensing of Musgrove and the countersignature of the two policies in question. In this letter he attempted to solicit business from the Musgrove Insurance Agency. This letter appears in the margin.[2] Hol-

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[2] "James Luther Culver
AA-108706
Oliver Wendell Holmes
AA-108707

"Dear Mr. Cadenhead:

"Thank you very much for your letter giving me the information we needed to apply for a Continental license for Mr. W. T. Musgrove. Mr. Musgrove's license has been ordered via our License Department in the Chicago Home Office, and it is my understanding that he should have it in his hands within two weeks.

"I am enclosing the two new policies for the above, which you sent to me. Will you please hold these in your office until Mr. Musgrove's license is received? After that it will be alright to deliver them to the insureds.

"You have been very kind and patient with us in this matter, and I sincerely appreciate your cooperation. Please be assured that we intend in all ways to honor your Continental licensing, and we want to do as much business with you as possible and help you in all ways. As you doubtless know, the Continental Casualty Company issues more policies for more different types of risks than any other company, and in the Accident and Health business of stock companies, the Continental Casualty Company is larger than the rest, combined.

"This means that we have the equipment, and we certainly hope we have the service to give you what you need. We have many

land then had the license request cleared through Continental Casualty's Agents' License Department in Chicago.[1] Musgrove was licensed by the Insurance Department of the State of Alabama on May 24 and this agent's license was forwarded to Musgrove on May 28, 1956.

Musgrove testified that he had a telephone conversation with Holland in February or March of 1956, during which Holland asked permission to apply for a resident agent's license for Musgrove and Musgrove gave the permission. Musgrove stated that they discussed the type of agency and the commission to be paid. Musgrove testified:

> "Q. In that same conversation did Mr. Holland make any statement to you with respect to what kind of an agent he wanted you to be, and that Continental Casualty Company wanted you to be, Mr. Musgrove?
>
> "The Court: What were the exact words he told you?
>
> "The Witness: To be a full agent for the aviation accident division, special risk department of the Continental Casualty Insurance Company to secure business in Florence, Alabama, and my territory for his company.

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attractive individual and group plans for all kinds of Sickness and Accident Insurance. My personal division, Aviation, encompasses all kinds of specialties and travell risks, and I am always on call to assist.

You will be hearing from me from time to time in fairly routine ways when I add your name to our special mailing list, and I hope that I shall be hearing from you regularly, too.

"Sincerely yours,

/s/ Herb Holland,

"Herbert V. Holland, Jr.,

Aviation—Travel Accident Division"

[1] For the license request, see footnote 14 infra.

"Q. Now during that same telephone conversation, did you and Mr. Holland have a discussion about how much business potentially there was in the North Alabama area?

"A. Yes, sir.

"Q. Did you and Mr. Holland in this conversation discuss anything about what sort of limits that they wanted to write, or wanted you to sell for the Continental Casualty Company in regard to aviation accident policies?

"A. Nothing more than they were the largest writer, and the highest limit, wrote big limits, and wanted it.

"Q. Did Mr. Holland during that telephone conversation make any statement to you in regard to what sort of limits on a policy that you could sell for the Continental Casualty Company, Mr. Musgrove?

"A. No, sir.

"Q. Did Mr. Holland at that time give you any information or advice about to whom and with whom you would do business with the Continental Casualty Company?

"A. Through his department, Herbert V. Holland of the Continental Casualty Company.

"Q. Did he at that time tell you that you would be subordinate to any other resident agent or any other sort of agent for the Continental Casualty Company in the State of Alabama.

"A. No, sir.

"Q. Did you, Mr. Musgrove, have any conversation on that same occasion with Mr. Holland about how you would be paid for the business that you sold for the Continental Casualty Company or not?

"A. Yes.

"Q. Will you tell us what that was?

"A. Full agency commission and to be handled like all my other business, in my business."

After Musgrove received his resident agent's license from Holland on May 28, 1956, these parties had no further contact whatsoever until February 4, 1957.

On December 10, 1956, Musgrove wrote Holmes a letter concerning Holmes' policies in force at that time. Concerning the policy with Continental, this letter stated:

> "Aviation Accident Policy which should be rewritten since you are flying a plane by yourself; this is written on a passenger basis and not as pilot, but you should have this changed to cover you as pilot of the plane, and I would appreciate your considering this and agreeing to change it. It will cost you more money but will give you the protection that is needed. This policy was charged to Pressure Concrete Company of Florence, and I think in all fairness, and I am sure you agree, that we should transfer this over to your account. Will appreciate very much your discussing this with me the next time we get together."

Musgrove then had a conversation with Holmes on January 3, 1957, and in that conversation Holmes stated he wanted aviation accident insurance on a pilot's coverage basis, and Musgrove told him that he was covered from then on. Musgrove made a notation reading, "Wendell Holmes Aviation Piolit (sic) . . ." and testified that he "went back to the office with it and turned it over to my partner, Billy Cadenhead, for processing and getting the policy endorsed or a new policy issued, whichever was necessary to be done." Musgrove told Cadenhead that Holmes was at that time insured by oral binder. The next day, January 4, Cadenhead wrote Continental Casualty Company stating:

"Continental Casualty Company.

Re: AA 108707
Oliver Wendall (sic) Holmes

"Gentlmen:

"It is Mr. Holmes wishes to also have pilots coverage under this policy so will you please send us the necessary applications to have completed, or advise us what information you need. I am not sure what kind of plane he is flying, but will secure this for you if necessary."

Thereupon Holland answered Cadenhead on January 7 with the following letter:

"Oliver Wendell Holmes
AA-108707

"Dear Mr. Cadenhead:

"We will be delighted to entertain Mr. Holmes' (sic) application for Pilot Coverage. I am enclosing another application which we would like to have him complete and also a Pilot History Form which also must be submitted.

"Depending upon Mr. Holmes experience and needs of the insurance, it is possible that our underwriters would not like to write as much as $50,000 principal sum for piloting. Completion of these two forms will help to determine this. If he should need only $25,000 while piloting, or that is all that could be written, we would be able to reduce the principal sum under the present policy to $25,000. All the present coverage is included in the Pilot Policy, so that he would have $50,000 just as he now has with $25,000 piloting. Of course, this is all problematical.

"Please let me know if I may be of further help."

Some six weeks later, on the night of February 20, 1957, Holmes brought the application and pilot's history form to Musgrove's office. The application had been partially filled out by Cadenhead. In the application was the question, "Do you understand and agree that no insurance will be effective until the policy is issued," and Cadenhead had inserted "yes". Concerning this answer Musgrove testified as to the conversation between him and Holmes:

"The Witness: . . . I mean he went over these, read, he said, 'Look there, right there,' and I told him—and then is when he questioned me. He said, 'Haven't I been covered since you bound me back there?'

"And I said, 'You have been covered for pilot's coverage.' And he said, 'Well, I have been flying just about every day.' And he said, 'What's this over here?' And I said that the 'Yes' right there wouldn't make any difference, because he was under binder, and it was just a mere formality of getting the document or the policy to him.

"I did not know whether the Continental Casualty Company would endorse it. If they endorsed it they didn't need this application; if they wanted to rewrite a new policy, then they would take this application and rewrite a new policy and this would become a part of the policy.

"And after that Mr. Holmes was satisfied with that, and I reaffirming to him at that time that you are covered flying as a pilot.'

"The Court: Is that what you stated to him?

"The Witness: Yes, sir.

"Mr. Cox: All right, now.

"The Court: Did he sign the application or had it already been signed?

"The Witness: No, sir, he signed it that night."

The next day, February 21, Oliver Wendell Holmes was killed while flying as a pilot, and on this date Musgrove had the application forms on his desk.

Cadenhead took the application and pilot's history form to Atlanta on February 25 and there met with Holland. Holland testified that during that meeting and also during a telephone conversation that day with Musgrove while Cadenhead was in Holland's office, neither Cadenhead nor Musgrove made any reference to or discussed the oral binding of insurance as to Holmes. However, Cadenhead testified that he told Holland on this occasion that Musgrove had told Holmes that he was covered and that Holland did not then deny that Musgrove had the authority to bind Holmes.

About a week later, on March 4, Holland made an office memorandum concerning the above meeting and discussing the method of placing pilot coverage. This memorandum is printed in the margin.[4] It had penciled in at the bottom

[4] "Memorandum

"To: File March 4, 1957

"Oliver Wendell Holmes
A/C 108708

"Monday, February 25, 1957, Mr. William R. Cadenhead of the Musgrove Insurance Agency, Florence, Alabama, came to see me asking if I had read in the papers that the above policyholder had been killed in an air crash. I was not aware of the tragedy. But I did know about Mr. Holmes' interest in extending his Aviation Division passenger accident policy to include piloting of certificated aircraft.

"Mr. Cadenhead and his employer, Mr. W. T. (Barney) Musgrove, were not approaching us with demands, just to ask advice.

"Here is the chronology of the situation:

"A 908 policy was issued in early 1956 providing passenger coverage in airworthiness aircraft, our A-3 program.

"On January 4, 1957, Bill Cadenhead wrote a short letter asking about riders to the policy to include piloting for Mr. Holmes. I answered that it probably would be difficult, but probably possible, to extend the $50,000 principal sum which he already had to include

thereof: "Activity toward greater Continental production in his agency is greater than ever."

Thereafter, upon a denial of coverage by Continental Casualty Company, this suit followed.

Plaintiff's theory of the case rests upon the authority of the agent to effect a policy of insurance by an oral binder or by an oral contract of insurance, concluding that if sufficient authority existed in the agent Musgrove to bind the Company, it is immaterial for plaintiff's recovery whether the authority be actual (express or implied) or apparent (ostensible). Plaintiff also proceeds on the collateral theory that Musgrove was a general agent for the Company, which position automatically gave him the power to orally bind the Company in various ways. In presenting this double-barreled approach, the plaintiff claims that Musgrove had authority whether he is found to be a general agent or something less, such as a soliciting agent.

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pilot. I said that Mr. Holmes would have to complete a new application and a Pilot History form.

"I heard nothing further until February 25, 1957. However, February 20, 1957, Mr. Musgrove obtained from Mr. Holmes a Pilot History form properly completed and a Special Risks Division tissue application which was to have accompanied the Pilot History form for Aviation Division underwriting. Of course, the application used asked the usual question, which was answered, about no insurance being effective until a policy could be issued.

"Mr. Cadenhead brought these two forms to my office on February 25 and we agreed that there was no binding for any part of $50,000 which Mr. Holmes was trying to place. I told Mr. Cadenhead that our limit for the 150 hours Mr. Holmes' Pilot History form showed is $10,000 and that while I could have bound on the information in the Pilot History form $10,000 pilot coverage I could not have gone higher. I told him that I would have answered these two forms if they had been presented to me for underwriting with an offer to help place the other $40,000 to $50,000 requirement with friendly competitor. I would have offered to bind the $10,000 we might have written if the agent had confirmed in some way.

"Mr. Cadenhead left satisfied.

"Herbert V. Holland, Jr."

Appellant's first and second specifications of error rest upon the refusal of the trial court to grant a motion for a directed verdict made at the close of all the testimony and the refusal to grant a judgment notwithstanding the verdict. In reviewing the latter motion, as well as the first, we must determine if the record contains evidence of "probative facts capable of supporting, with reason," the verdict; for if it does, the verdict must stand.[5] Another similar test to review jury verdicts is that if there is **any substantial evidence** which supports the verdict it must stand.[6] "Substantial evidence" has been best defined by Chief Justice Hughes as follows: "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[7] With these premises in mind, we hold that appellant's first two specifications of error are well taken as there was no substantial evidence that Musgrove had either actual or apparent authority to orally bind Continental Casualty Company.

We state at the outset that the test to determine whether a general agency exists, in both Alabama case

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[5] Myers v. Reading Co., 1947, 331 U. S. 477, 485. See, also, Thomas v. Atlantic Coast Line Ry. Co., 5th Cir., 1955, 223 F. 2d 1, 4; Reuter v. Eastern Air Lines, 5th Cir., 1955, 226 F. 2d 443, 446.

[6] Aetna Life Ins. Co. v. Ward, 1891, 140 U. S. 76, 91; Lancaster v. Collins, 1885, 115 U. S. 222.

[7] Edison Co. v. Labor Board, 1938, 305 U. S. 197, 229. While this was an administrative case, the rule stated is applicable as well to jury verdicts.

[8] The general statements following in the body of the opinion are paraphrased from 16 *Appleman, Insurance Law & Practice*, § 8691, p. 101, and are correct statements of both general insurance law and Alabama case law. This section states in part:

> "A great deal of confusion has arisen in the law of principal and agent, in so far as insurance contracts are concerned, by the loose terminology employed by many courts. Often, in their desire to find a waiver or estoppel, they have used a double

law and in general insurance law, is whether the agent has the power to bind the insurer by his contract of in-

edged reasoning, stating that because an agent does thus and so, he is a general agent, and because he is a general agent, he can do many other things in addition thereto. It is true, as will be shown later, that a general agent can bind the insurer in many ways which a soliciting agent cannot. It is important, however, to find a precise and exact test which will be susceptible of easy application. That test is whether or not the agent has the power to bind the insurer by his contract of insurance, or to issue policies on his own initiative, or to accept risks, and if the agent has actual authority to do these things, he is a general agent; if he cannot place coverage in effect, but can merely initiate negotiations therefor, he is not a general agent."

[Thus far, we agree wholly with Appleman's text. However, in the following portion, we express some doubt as to the pragmatic statements that a general agent can be created only by actual authority. It seems to us, where the third person relies to his detriment upon the apparent or ostensible authority of an agent and this authority is that normally of a general agent, the agent is, for that transaction, a general agent in the normal sense of that term and the insurer may be bound through the doctrine of ratification, estoppel, or waiver. However, these distinctions may be based more on legal gymnastics or on semantics than on disagreement of legal principles.]

"It is important not to reason backward in applying such a test. Thus, to take a soliciting agent who can merely solicit applications, deliver policies, or do other acts, and say brashly that he was apparently vested with ostensible authority to bind the insurer by his contract, that the insured was justified in relying thereon, that the agent was, therefore, a general agent, and because of that had the power to bind the insurer by his contracts, is a mere circumlocution of logic which would permit the court in any case desired to find a general agency. A general agency cannot be based upon implied, apparent, or ostensible authority. There must be actual authority to bind the insurer by the issuance of a policy or the completion of a contract. If such actual authority exists, the other powers of a general agent necessarily co-exist upon which the insurer can be bound in other ways. If such actual authority does not exist, the agent is not a general agent, regardless of his ostensible powers, and the insurer could be bound by his contracts of insurance only through the doctrines of waiver, estoppel, or ratification. If this distinction and definition is borne in mind, and the few decisions which are clearly erroneous are dropped into limbo, little difficulty can arise."

surance, or to issue policies on his own initiative, or to accept risks, and if the agent has actual authority to do these things he is a general agent"[9] he may then bind the company in other ways, such as by oral contract, by waiving certain policy or application provisions and the like.[10] The general agent whose authority is limited in some way or an agent who is, by certain limitations, less than a general agent may also bind his principal in the above ways as though he were a general agent, by apparent or ostensible authority through the doctrines of waiver, estoppel, or ratification, and, of course, the injured party must have relied upon his apparent authority in some way to his detriment.[11] He may also be less than

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[9] *Ibid.* The test to determine general agency in Alabama law is the same. See Liberty Nat. Life Ins. Co. v. Staggs, 1942, 242 Ala. 363, 6 So. 2d 432; United Burial & Ins. Co. v. Collier, 1931, Ala. App., 130 So. 104, cert. den., 130 So. 106; Robinson v. Aetna Ins. Co., 1901, 30 So. 665, 128 Ala. 477. See, also, Piedmont Fire Ins. Co. v. Tierce, 1944, 245 Ala. 415, 17 So. 2d 133, 136; and Bankers & Shippers Ins. Co. of New York v. Blackwell, 1954, 260 Ala. 463, 71 So. 2d 267.

[10] 16 Appleman, *op. cit. supra*. E. g., See Simpson Sales Co. v. British Gen. Ins. Co., 1952, 257 Ala. 280, 58 So. 2d 301, where a territorial limitation upon the authority of a *general agent* does not bind an insured who has no notice of the agency limitation and deals with the agent to his harm; Piedmont Fire Ins. Co. v. Tierce, 1944, 245 Ala. 415, 17 So. 2d 133, where general agent of fire insurance company waived policy provisions; United Burial & Ins. Co. v. Collier, note [9], *supra*, where a general agent could bind the company by an oral contract to insure; United States Life Ins. Co. v. Lesser, 1900, 126 Ala. 568, 28 So. 646, where a soliciting agent's authority was extended by parol to that of a general agent and he then waived a provision of the policy regarding payment of premium.

[11] 16 Appleman, *op. cit. supra*. United Burial & Ins. Co. v. Collier, note [9], *supra*; Fidelity-Phoenix Fire Ins. Co. v. Ray, 1916, 196 Ala. 425, 72 So. 98; Ray v. Fidelity-Phoenix Fire Ins. Co., 1914, 187 Ala. 91, 65 So. 530; Robinson v. Aetna Ins. Co., 1901, 128 Ala. 477, 30 So. 665; National Life Ins. Co. v. Reedy, 1928, 217 Ala. 114, 115 So. 8; Liberty Nat. Life Ins. Co. v. Staggs, 1942, 242 Ala. 363, 6 So. 2d 432, 433.

a general agent (such as a soliciting agent) and have actual authority to bind the company by oral binders or contracts in certain types of insurance.[12]

I. Actual Authority

(a) General Agent.

Therefore, if Musgrove had the power to bind the Company "by his contracts of insurance, or to issue policies on his own initiative, or to accept risks," or if the Company designated Musgrove to be a general agent by some action or manifestation, then he would be a general agent with the power to bind the Company in the manner claimed by Mrs. Holmes. It is elementary that **actual authority** can only be created "by written or spoken words or other conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him to act on the principal's account."[13]

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[12] 16 Appleman, *op. cit. supra*. The typical examples are fire insurance agents. See Tutton v. Liverpool & London & Globe Ins. Co., 1939, 237 Ala. 230, 186 So. 551, 556; Sun Ins. Office of London v. Mitchell, 1914, 186 Ala. 420, 65 So. 143, 145. For a distinction between agents of fire and life insurance companies, see American Life Ins. Co. of Alabama v. Aladdin Temple Ben. Ass'n, 1939, 238 Ala. 513, 191 So. 903, 906. See also Bankers & Shippers Ins. Co. of New York v. Blackwell, 1954, 260 Ala. 463, 71 So. 2d 267.

[13] This basic rule is succinctly stated in Section 26, Restatement of Agency, Second:

§ 26. *Creation of Authority: General Rule.*

"Except for the execution of instruments under seal or for the performance of transactions required by statute to be authorized in a particular way, authority to do an act can be created by written or spoken words or other conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal's account."

The facts which Mrs. Holmes vigorously insists establish by substantial evidence that Musgrove had authority as a general agent are discussed as follows:

First, Musgrove's testimony as to a telephone conversation in February or March of 1950 where Holland assured Musgrove that he would be a "full agent . . . to secure business" and would receive a "full agency commission," as quoted supra. This is appellee's strongest evidence. However, this conversation took place prior to the issuance to Musgrove of a license by the State Department of Insurance at a time when Musgrove was not an agent of the Company. The term "full agent" can only be reasonably construed as bringing into existence the status of principal and agent or employer and employee, not as conferring general-agency powers upon Musgrove.

Second, the agent's certificate or license from the Superintendent of Insurance of the State of Alabama, authorizing Musgrove to act with the powers listed as "Miscellaneous Casualty, including Official Surety Bonds." Summarily, this certificate "is only evidence of the existence of the agency in some form." **American Life Ins. Co. of Alabama v. Carlton**, 1942, 242 Ala. 661, 8 So. 2d 166, 169. See also **Liberty Nat. Life Ins. Co. v. Staggs**, 1942, 242 Ala. 363, 6 So. 2d 432, 433; **American Life Ins. Co. of Alabama v. Aladdin Temple Ben. Ass'n.** 1939, 238 Ala. 512, 191 So. 903.

Third, Plaintiff's Exhibit No. 13, which was a request from the Atlanta branch office to the General Office in Chicago of Continental Casualty Company to license Musgrove as an individual resident agent. Appellee places great emphasis upon paragraph 8 of this request. Paragraph 8 entitled "Applicant will report business through" is answered "Atlanta" as the branch office

and "Musgrove Insurance Agency" as the General Agency or Agency. The pertinent portions of this application are reported in the margin.[14] Holland testified un-

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[14] "Date May 4, 1956

"1. Applicant

"Name Musgrove, (Last) William (First) Thomas (Middle)

"3. Request (Check appropriate box in each column.)

[XX]	License	[XX]	Individual
[ ]	Appointment	[ ]	Corporation
		[ ]	Partnership
[XX]	Agent		
[ ]	Broker	[XX]	Resident
[ ]	Special Representative	[ ]	Non-Resident

"5. State in Which Applicant Is to Be Licensed

Alabama

"6. Lines or Authority of License to Be Issued

(Specify each line of insurance requested.)

Accident and Health

"7. License Status of Applicant (Check all applicable answers. Supply necessary information.)

Applicant: (Complete blanks directly below. Form will be returned if not answered fully.)

[XX] Already licensed in state specified in item 5 by reason of an appointment by another Company.

[ ] Already licensed in state specified in item 5 by direct issuance of a license by the Insurance Department.

Agent		Accident & Health	
Applicant licensed as: Agent, Broker, etc.		Licensed to sell what kinds of insurance?	Accident & Health
No. Number License No.	12/31/1955 Date license issued?	Licensed with what kind of Company?	

"8. Applicant Will Report Business Through

equivocally that the information under paragraph 8 was for the sole purpose of identifying any business produced by Musgrove as belonging to the Atlanta Branch Office, and this request never went out of the offices of the Company and was not known to Musgrove until after this litigation was commenced and was never known to Holmes. However, even had Musgrove known of this instrument, the only manifest purpose of the instrument was a request to license an agent. We agree with appellant that it is without reason to interpret Plaintiff's Exhibit No. 13 as affording the basis of a finding that Musgrove was a general agent of the Company.

Fourth, Musgrove's authority to issue trip accident policies. While Holland testified that Musgrove had authority to issue these individual trip accident policies, the record indicates that he never issued one and did not receive any policy blanks until after February 27, 1957, the date on which a book of "VBT Travel-Accident Policies" was sent to Musgrove. Even had Musgrove received and made out these policies, it would not be evidence of general

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8. Complete Home Office and General Agent or Agency Or Branch and General Agent or Agency.

Answer fully. This information essential to both the recording and renewal of licenses. Form will be returned if incomplete

Name of Division — Home Office Division
Atlanta — Branch Office
Name of Branch
Musgrove Insurance Agency — General Agent or Agency
Name of Agent or Agency

First Nat'l Bank Bldg., Florence, Alabama
General Agent or Agency Address"

agency. These policies required no formal underwriting and would not, of course, have covered flying as a pilot or crew member. We agree with appellant that there is no substantial difference between this type of policy and the policies which can be procured from vending machines in all major airports. This type policy is characterized by the necessity of immediate issuance, and the basic differences between it and a Health and Accident Policy on a pilot for $50,000 for a year are so obvious as to warrant no further discussion.[15]

Fifth, certain correspondence which passed between Holland and Musgrove or Caden, ad. This correspondence has already been set out in this opinion. For instance, see Holland's letter of February 23, 1956, Holland's letter of May 7, 1956, Cadenhead's letter of January 4, 1957, Holland's letter of January 7, 1957, Holland's memorandum of March 4, 1957. Appellee insists that these items of correspondence, either individually or collectively, are substantive evidence of Musgrove's authority as a general agent. Again we do not agree. A careful reading of the letters in the light most favorable to appellee indicates that they have no probative value in ascertaining or indicating Musgrove's authority to act as a general agent, but rather these letters indicate a limited agency.

Sixth, the fact that Holmes was given life insurance as a passenger effected by oral binder from 17th February until the middle of May, 1956. Appellee in brief and in the court below insists that **Musgrove** orally bound the Company for this time and such fact is strong evidence of his authority to orally bind the Company on the contract in question. However, the record clearly shows

[15] These trip accident policies can perhaps be compared with certain fire policies where a soliciting agent has authority to bind his company orally or otherwise. See note 12, *supra*

that Holland and not Musgrove bound the coverage as to Holmes and Culver on February 17, 1956, after obtaining the necessary information from Queen Insurance Company and that this was confirmed to Musgrove by letter on February 23, 1956, which also contained the applications. The Company accepted the risk here. Further, Musgrove was not an agent of Continental Casualty Company on February 17, 1956.

Other pertinent facts, which are undisputed, showing the relationship between Musgrove and Continental Casualty Company are briefly as follows. During the period from February 17, 1956, through February 20, 1957, Musgrove or his agency did not have in possession any blank policies providing for aviation accident insurance or blank applications of Continental Casualty Company relating to such insurance, except the two original applications signed by Holmes and Culver and the second application signed by Holmes on February 20, 1957; and during this time, Musgrove handled no insurance business for Continental except those applications above. Holland, who was the only representative of Continental with whom Musgrove dealt, did not have authority from Continental to extend to an agent authority to bind normal aviation accident insurance (except trip policies) and did not have authority to authorize an agent to write policies covering flying as a pilot.

Musgrove did not receive any specific instructions from Holland concerning his agency and had no written agency contract with Continental other than the license issued by the Alabama Department of Insurance.

The undisputed evidence further showed that the underwriting in connection with applications for insurance of the type involved in this case was done either in Atlanta or Chicago. And it was not the practice during

1956 and 1957 of any company writing accident and health insurance in Alabama to give oral binders.

There was also undisputed evidence to show that Musgrove knew that he did not have actual authority to accept risks and make contracts for Continental and therefore was not a general agent. This evidence is: First, the two applications for coverage of Holmes and Culver while flying as passengers (which were sent to Musgrove for the signature of Holmes and Culver after an oral binder had been effected by Holland on the basis of the applications to Queen Insurance Company) contained the same question as the later application for pilot coverage, which was "Do you understand and agree that no insurance will be effected until the policy is issued?" Second, the two original policies issued on the above applications which insured Holmes and Culver while flying as passengers had as a normal policy provision the following:

> "This policy, including the endorsements and the attached papers, if any, constitutes the entire contract of insurance. No change in this policy shall be valid until approved by an executive officer of the Company and unless such approval be endorsed hereon or attached hereto. No agent has authority to change this policy or to waive any of its provisions."

Third, the application for pilot coverage signed by Holmes on February 20, 1957, stated: "12. Do you understand and agree that no insurance will be effected until the policy is issued?" This was answered, "Yes." Fourth, Musgrove had in his possession a pamphlet from Continental captioned "THIS IS MAX" and relating to policies covering passengers in certain specified aircraft. This pamphlet limited the authority of agents by providing:

> "Binding—Regular MAX: No agent has authority to bind coverage. Policies are to be dated effective

on the date the issuing office approves application. (See question #13 on app SRZ-1171-B.)"

We also place some emphasis on the fact that Cadenhead, in his letter to Holland of January 4, 1957, merely asked for application forms for pilot coverage and did not mention that Musgrove had orally bound the Company for $50,000, knowing that Musgrove had assured Holmes of coverage. Again, after receiving Holland's letter of January 7, 1957 (which stated, "We will be delighted to entertain Mr. Holland's application for Pilot Coverage" and expressed doubt as to a $50,000 pilot's coverage), Cadenhead did not advise Holland of Musgrove's oral binder of January 3.

We are of the opinion that all of the evidence in this case can only show that Musgrove was merely a "local" or "resident" agent, having the powers normally conferred on a "soliciting" agent with no actual authority to bind the Company by oral contract or binder, and that his actions in assuring Holmes of immediate coverage were clearly without the scope of his actual authority. There were no "written or spoken words or other conduct of Continental Casualty Company which, reasonably interpreted, caused Musgrove to believe that Continental desired him to act on Continental's account as a general agent."[15]

(b) Soliciting Agent.

Anticipating that the evidence might not meet the requirement of showing a general agency, appellee alternatively alleges that Musgrove's authority as a soliciting agent was broad enough to effect an oral binder of this sort, since

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[15] Paraphrased from Restatement, Agency, Second, § 20, note 13, *supra*.

> "... almost all soliciting agents are now given the power of temporary binder to protect the insured while his application is being considered by the company for acceptance or rejection." 16 **Appleman, Insurance Law and Practice**, § 8691, p. 105.

This statement is taken out of context and refers to a fire insurance agent's power to issue ten-day binders which are "more or less automatic, and ministerial in their nature." An analogous power which Musgrove had was the issuance of the individual trip accident policies. However, neither of these even resemble the general agent's power of issuing policies, accepting risks, and other acts involving the "exercise of selection and discretion." 16 **Appleman**, supra, p. 105.[17]

II. Apparent Authority.

The countersuit below instituted against the Musgrove Insurance Agency and the two individuals as partners was based entirely on apparent authority of Musgrove to so act. Again, it is elementary that, before a principal may be bound by its agent's apparent or ostensible authority, the person dealing with the agent must have relied on the appearances in some way to his detriment.[18]

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[17] See notes 12 and 15, *supra*.

[18] See cases in note 11, *supra*. Section 27, Restatement of Agency, Second, states:

> "§ 27. *Creation of Apparent Authority: General Rule.*
>
> "Except for the execution of instruments under seal or for the conduct of transactions required by statute to be authorized in a particular way, apparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him."

See, also, 16 *Appleman*, *supra*, § 8674.

We agree with the appellant that, "in the case at bar, there was clearly no factual basis for the trial court to submit to the jury the question of apparent or ostensible authority of Musgrove, for the reason that there was no holding out by Continental Casualty Company of Musgrove as an agent authorized to make contracts of insurance." See 2 C. J. S., Agency, § 96, pp. 1205-1206. While the evidence shows that the book of VBT travel-accident policies came into Musgrove's possession after Holmes' death, even if Holmes had known that Musgrove could have issued these trip policies (there was no evidence on this), the policies themselves would have put Holmes on notice that they did not cover a pilot or crew member or anything other than trip insurance. See **Great American Casualty Co. v. Eichelberger**, 37 S. W. 2d 1050; **Hartline v. Mutual Benefit Health & Accident Ass'n**, 1938, 5th Cir., 96 F. 2d 174.

According to Musgrove's testimony, Holmes twice relied on Musgrove's assurance that he was covered by oral binder, once on January 3 and again on January 20, but this reliance cannot impose liability on the Company as there is a complete absence of actual or apparent authority.

The judgment is therefore reversed and the cause remanded with directions to enter judgment for the defendant. See 28 U. S. C. A., § 2106.

Reversed and Remanded With Directions.

APPENDIX B.

Statutes.

Title 7, Sec. 164, Code of Alabama 1940.

Sec. 164. **Jury trial.** When a proceeding under this article involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.

Title 28, Sec. 12, Code of Alabama 1940.

Sec. 12. **Remedy of injured party after recovering judgment.** Upon the recovery of a final judgment against any person, firm or corporation by any person, including administrators or executors for loss or damage on account of bodily injury or death, or for loss or damage to property, if the defendant in such action was insured against said loss or damage at the time when the right of action arose, the judgment creditor shall be entitled to have the insurance money provided for in the contract of insurance between the insurance company and the defendant, applied to the satisfaction of the judgment, and if the judgment is not satisfied within thirty days after the date when it is rendered, the judgment creditor may proceed in equity against the defendant and the insurance company to reach and apply the insurance money to the satisfaction of the judgment.

Title 7, Sec. 108, Code of Alabama 1940.

Sec. 108. **Misrepresentations.** Misrepresentations of a material fact, made wilfully to deceive, or recklessly without knowledge and acted on by the opposite party, or if

made by mistake and innocently, and acted on by the opposite party, constitute legal fraud.

Title 7, Sec. 110, Code of Alabama 1940.

Deceit. Wilful misrepresentation of a material fact, made to induce another to act, and upon which he does act to his injury, will give a right of action. Mere concealment of such a fact, unless done in such a manner as to deceive and mislead, will not support an action. In all cases of deceit, knowledge of a falsehood constitutes an essential element. A fraudulent or reckless representation of facts as true, which the party may not know to be false, if intended to deceive, is equivalent to a knowledge of the falsehood.

Rule 38 (b), Federal Rules of Civil Procedure.

(b) Any party may demand a trial by jury of any issue triable of right by a jury serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than ten days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

Rule 81 (c), Federal Rules of Civil Procedure.

(c) Removed Actions. These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, he shall answer or present the other defenses or objections available to him under these rules within 20 days after receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within twenty days after the

service of summons upon such initial pleading, then filed, or within five days after the filing of the petition for removal, whichever period is longest. If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it, if his demand therefor is served within ten days after the petition for removal is filed, if he is the petitioner, or if he is not the petitioner, within ten days after service on him of the notice of filing the petition.